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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-330

No. ~~1-876~~ 1

WILLIE JAMES THARPE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Willie James Tharpe, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on May 28, 1971, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated May 28, 1971, has not been reported to date. This opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals is dated May 28, 1971, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the Government may disregard the acts and statements of an informer which were a part of the course and conduct of the inducement to commit a crime and convict the petitioner for an act which was the product of the inducement on the grounds that the act occurred after the inducement?

STATEMENT OF CASE

Jurisdiction of the District Court of the Eastern District of North Carolina was invoked because petitioner was charged with violations of Federal Internal Revenue Acts.

The Bill of Indictment charged, as a First Count, that the petitioner, Willie James Tharpe, along with a co-defendant, Palmer Jerome Elmore, on or about May 28, 1970, did unlawfully remove certain distilled spirits, to wit 300 gallons of whiskey, on which the tax had not been paid or determined as required by law in violation of 26 U.S.C. 5601(a)(12) in the First Count thereof. The Second Count of the Bill of Indictment charged that the petitioner, Willie James Tharpe, and Palmer Jerome Elmore, on the same date, did possess certain distilled spirits, to wit 300 gallons of whiskey, the immediate containers of which did not then and there have affixed thereto a stamp evidencing the determination of the tax of indicating compliance with the provisions of the revenue code of the United States relating to distilled spirits in violation of 26 U.S.C. 5205(a)(2), 5604(a)(1). The Third Count of the Bill of Indictment charged that the petitioner, Willie James Tharpe, on the same date, transported 300 gallons of whiskey, the immediate containers of which did not then and there have affixed thereto a stamp evidencing the determination of tax or indicating compliance with the provisions of the revenue code of the United States relating to distilled spirits in violation of 26 U.S.C. 5205(a)(2), 5604(a)(1). TR. pp. 143-144.

The petitioner, Willie James Tharpe, waived jury trial to the charges in Counts Four and Five and upon his plea of not guilty, was found not guilty by the Court. TR. p. 161.

The defendant, Palmer Jerome Elmore, waived trial by jury and was tried separately from the petitioner, Willie James Tharpe, by the Court and his case is not involved in this appeal. TR. p. 145.

The petitioner, Willie James Tharpe, upon his plea of not guilty, was tried on Counts One, Two and Three of the Bill of Indictment, by a jury at trial commencing October 26, 1970. TR. p. 1.

The petitioner relied solely upon the defense of entrapment. TR. pp. 122-124, 147-148.

The petitioner was prevented by the Court from testifying to statements made by a person named Sammie Weatherman who the petitioner contended had played a major part in wrongfully inducing him to make sales of nontaxpaid whiskey to the government witness, Thomas W. Stokes. TR. pp. 38-43.

The petitioner, Tharpe, objected to the exclusion of evidence as to his conversations with Sammie Weatherman and had the record show out of the presence of the jury, what conversations he had with Sammie Weatherman prior to the sales. TR. pp. 64-67.

The evidence excluded would have shown that the informer, Sammie Weatherman, continually pleaded with the petitioner from the early fall of 1969 to sell agent Stokes, alias Bill Ingram, some whiskey. That petitioner refused. That Sammie Weatherman continued to contact the petitioner almost every day or night and plead for him to sell agent Stokes some whiskey and that petitioner finally sold Stokes some whiskey on April 24, 1970. That the informer, Sammie

Weatherman, was active in actually arranging for the details of the April 24 transaction. TR. pp. 38-40, 42-43, 64-66.

The petitioner contends that the negotiations with Sammie Weatherman were a material part of the transaction and a major factor in inducing him to make both sales to government witness, Thomas W. Stokes. The petitioner contends that the Court, in this ruling, deprived the petitioner of a major portion of his evidence indispensable to the defense of entrapment.

The jury returned a verdict, after deliberating for one hour and thirteen minutes, of guilty as to the First, Second and Third Count of the Bill of Indictment. TR. p. 159.

The Court consolidated Counts One and Two of the Indictment for entry of judgment and entered judgment that the petitioner be committed to the custody of the attorney general or his authorized representative for a period of two years and on Count Three of the Bill of Indictment that imposition of sentence was suspended and the petitioner placed on probation for a period of five years from the date of completion of the sentence imposed in Counts One and Two, consolidated and subject to the conditions of probation set forth in the written minutes of the Court to which reference is made of the conditions thereof. TR. p. 164.

On October 29, 1970, the petitioner, Tharpe, filed Notice of Appeal to the United States Court of Appeals for the Fourth Circuit from the judgments and sentences of the Court. The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court. Appendix 1A.

RELEVANT FACTS

Alcohol, tobacco, and firearms division officer, Thomas W. Stokes, testified as follows:

That on or about May 27, 1970, at about 3:00 in the afternoon, he placed a telephone call to the petitioner, Tharpe, and told him that he was the individual that had been up there earlier and that he needed some more whiskey before the weekend. TR. p. 8. It was agreed between agent Stokes and the petitioner that Stokes would call him back at 10:00 that night and the petitioner would let him know. Stokes told the petitioner that he wanted the whiskey by Thursday night and the petitioner said "I know what you mean." TR. p. 8. Stokes told the petitioner that he needed 50 cases or 300 gallons. TR. pp. 8-9.

Agent Stokes contacted the petitioner again by telephone at about 10:30 p.m. on May 27, 1970, and it was agreed that the petitioner would sell Stokes the amount of whiskey he wanted of the submarine still type for $23.00 per case and Stokes agreed to be there with something that could handle all of the whiskey in one trip and he would be there about 8:00 or 8:30 the following night. TR. pp. 9-10.

On May 28, 1970, the witness Stokes rented a U-haul type van truck of approximately two-ton capacity and arrived at Tharpe's Community Grocery Store at about 9:15 p.m. TR. pp. 11-13.

At about 9:30 p.m. the petitioner left the store driving the U-haul truck and returned about 10:00 p.m. and after the petitioner opened the truck doors and showed Stokes the 300 jugs in one-gallon plastic containers the petitioner was arrested. TR. pp. 14-16.

Agent Stokes admitted on cross-examination that in his statement on file with the U. S. attorney that there was nothing in the statement showing any details concerning whiskey bought before May 28, 1970, and that the transaction before May 28, 1970, was a nontaxpaid whiskey transaction. TR. pp. 18-19. He left out the details of the prior transaction because he wasn't instructed to put it in. TR. p. 20.

Officer Stokes on cross-examination detailed a transaction which took place on April 24, 1970, wherein the petitioner, Tharpe, sold him 30 cases of whiskey at $25.00 per case. TR. pp. 22-26.

The witness Stokes further testified on cross-examination that he had never seen or talked to the petitioner, Tharpe, prior to April 24, and that he told the petitioner that he was Sammie's friend. The Sammie he was talking about was Jessie Sammie Weatherman, Jr., and that he told him that Sammie had sent him and that he had left that out of his statement also. That he told the petitioner Sammie sent him because he was acting on instructions that he had received from Special Investigator Powell. TR. pp. 26-28.

On cross-examination, agent Stokes further testified that the first time he ever talked with Willie James Tharpe was on April 24, 1970. The first time he ever talked with him on the telephone was on May 27, 1970. TR. p. 31.

On cross-examination, officer Stokes further testified that all it took to get the April transaction going was to tell the petitioner that Sammie sent me. TR. p. 32.

Officer Stokes further testified on cross-examination that he had purchased some more whiskey in the area and that Sammie was working with him then, too. TR. p. 33.

The petitioner, Willie James Tharpe, testified as follows:

That he had lived in Wilkes County all of his life and has wholesale and retail grocery businesses. That his businesses are named Tharpe's Community Store and Wholesale Grocery and Tharpe's Supermarket. That the Supermarket is located at Hays, North Carolina, and the Community Store and Wholesale is located on Highway 268 East of North Wilkesboro. TR. pp. 36-37.

That the first time he saw the witness, Thomas W. Stokes, was somewhere around the first of January, right after Christmas, at Tharpe's Supermarket in Hays. TR. p. 37.

That he knew Sammie Weatherman prior to January, 1970. That he had traded with him ever since he moved into the Rock Creek community in late summer. TR. p. 38.

The petitioner testified that Stokes first told him that Sammie had sent him and that he could probably fix him up with some good whiskey and the petitioner told Stokes that the petitioner was not in the liquor business and did not want anything to do with it and didn't know anyone who was in the liquor business. Stokes stated that he had been buying whiskey at $21.00 a case but it was a lower quality whiskey, and that his business was going to the bad and he was losing all of the business he had and that he wanted to get some good Wilkes County liquor. The petitioner again told Stokes that he wasn't in the whiskey business and didn't have any or didn't know where he could find any. TR. pp. 40-41.

The petitioner further testified that after the first meeting, Stokes called the petitioner by phone on numerous occasions. TR. p. 42. That Stokes called if not every week, every other week and that the petitioner saw Sammie every day or night. TR. p. 42.

That the first time Stokes called he said, "I am Sammie's friend." TR. p. 43. That on subsequent telephone conversations, Stokes would talk about liquor in terms of "apples" and "potatoes" and ask the petitioner if he could fix him up. TR. pp. 43, 44, 45.

The petitioner further testified that in all the telephone conversations with Stokes, he told him that he was sorry that he couldn't help him, that he wasn't in the liquor business and didn't want to fool with it and didn't know of any-

one that did have it, and that he didn't want to mess with it. TR. p. 44.

That after three or four telephone calls, the petitioner finally told Stokes that he didn't know whether he could help him or not. TR. p. 44.

The petitioner further testified that Stokes and Sammie made from 12 to 15 calls to the petitioner prior to the April transaction. TR. p. 47.

The petitioner further testified that he told the witness Stokes that every time he contacted him over a period of five months time that he didn't have any whiskey, wasn't in the liquor business and didn't know where he could find any for him. TR. p. 48.

The petitioner, Tharpe, further testified that he didn't see the witness Stokes after the April transaction until May 27, 1970, and Stokes identified himself by saying "I'm Sammie's friend." TR. pp. 48-49.

The petitioner further testified that he had no convictions of any kind prior to the charges now before the Court except two speeding violations, ten miles over the speed limit. TR. p. 49.

The petitioner, Tharpe, further testified that he changed his mind about selling liquor after a period of time, after his confidence was won and he was influenced to do it and in need of money and Stokes' co-partner, Sammie, living with him, begging him to help out his uncle. TR. p. 55.

The petitioner further testified that his financial situation, because of a tax assessment and lawyers' fees, was not the sole reason he sold the liquor. TR. p. 56.

REASONS FOR GRANTING WRIT

The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

The decision in this case allows the Government callously to disregard the acts and statements of an informer which was a part of a course of conduct that induced the petitioner to commit a crime and convict the petitioner for an act which was a product of the inducement on the grounds that the sale, for which the petitioner was convicted, occurred after the inducement.

The decision of the United States Court of Appeals for the Fourth Circuit in this case is completely contrary to *Sherman v. United States,* 356 U.S. 369 (1958).

There can be no question, in a reasonable mind, of the sure knowledge on the part of the Government that the petitioner had been induced on April 24, 1970, to commit federal offenses identical to the one for which he was convicted. On April 24, 1970, petitioner sold agent Stokes 30 cases of whiskey at $25.00 per case. TR. pp. 22-25.

The Government's knowledge that their informer, Sammie Weatherman, had induced the defendant to make the sale on April 24, 1970, caused the Government to fail to prosecute for the crimes committed on April 24, 1970.

In order to make the cover-up complete, agent Stokes did not even make a report concerning the April 24, 1970, transaction until pressed on cross-examination. TR. pp. 18-22.

The work of the informer, Sammie Weatherman, was done so well that all the agent Stokes had to do on April 24, 1970, to get the transaction going was to go to the petitioner's store and tell him that Sammie had sent him. TR. p. 32.

Agent Stokes told the petitioner that Sammie had sent him upon instructions from special investigator Powell. TR. p. 28.

Agent Stokes also used Weatherman in the same type of undercover transaction in the same area. TR. p. 33.

The Court of Appeals correctly agreed with the petitioner that the exclusion of his testimony as to acts and statements of the informer, Sammie Weatherman, continually from the early fall of 1969 was error. The Circuit Court in so finding said:

> "Willie James Tharpe appeals his conviction for transporting nontaxpaid distilled liquor in violation of 26 U.S.C. § 5601. At trial, Tharpe, who admitted the transaction, based his defense on entrapment. He contended he succumbed to the importunities of a government agent named Stokes and a government informer named Weatherman after he had initially set his will against breaking the law. The trial judge, however, excluded Tharpe's testimony about the informer's alleged statements as hearsay on the ground that there was no showing Weatherman was working for the government.
>
> Exclusion of Tharpe's testimony describing Weatherman's statements was error. On cross-examination, Stokes, who admitted knowing Weatherman, testified he told Tharpe that he was Weatherman's friend and that Weatherman had sent him. He also admitted he did this on instructions from his superior officer. These facts are sufficient to establish that Weatherman was an instrument in the government's investigation of Tharpe, and statements Weatherman made which might have worn down Tharpe's will were relevant to the entrapment issue." Appendix p. 2A.

The petitioner's evidence would also have shown, if allowed to have been introduced by the Court, that the informer, Sammie Weatherman, was active in actually arranging for the details of the April 24, 1970, transaction. The erroneously excluded evidence is shown in the record. TR. pp. 38-40, 42-43, 64-66.

The Fourth Circuit Court of Appeals affirmed the conviction of the petitioner and said:

> "In this case, by his own testimony Tharpe acknowledges a *hiatus* of over a month between his last contact with Weatherman in April when he had made a sale to Stokes at Weatherman's urging and the commission of the offense in May. He also admits that Stokes did not contact him for the same length of time. Moreover, he stated that he was in serious financial difficulty and that he agreed to deal in nontaxpaid distilled liquor because he needed the money. In these circumstances, Stokes' request for a delivery of illegal whiskey in May was no more than a solicitation which gave Tharpe the opportunity to commit a crime." Appendix pp. 2A, 3A.

It is clear that the major consideration for the decision of the Circuit Court affirming the conviction of the petitioner was the "hiatus."

The fact that the petitioner was in financial difficulty is relatively unimportant to the Circuit Court decision for the petitioner testified that his financial condition was not the only reason he sold the whiskey. TR. pp. 55-56.

The petitioner, Tharpe, further testified that he changed his mind about selling liquor after a period of time, after his confidence was won and he was influenced to do it and in need of money and Stokes' co-partner, Sammie, living with him, begging him to help out his uncle. TR. p. 55.

The decision affirming the conviction of the petitioner completely ignores *Sherman v. United States, Supra,* wherein the Government agents attempted the same procedure and this Court properly said at page 374:

> "It makes no difference that the sales for which the petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the induce-

ment but part of a course of conduct which was the product of the inducement."

The defendant testified that the agent Stokes, when he arranged for the sale on May 28, 1970, identified himself as "I'm Sammie's friend." TR. pp. 48-49.

Petitioner's excluded evidence discloses that the sale on May 28, 1970, was the product of the prior inducement and the petitioner has been greatly prejudiced by the denial of his right to present all of his evidence to the jury on the issue of entrapment.

Since *Sorrells v. United States,* 287 U.S. 435, (1934), the issue of entrapment has been a question for the jury to decide where, as here, there is conflicting evidence.

The decision of the court below completely condones the procedure repudiated in *Sherman v. United States, Supra,* and deprives the petitioner of the right to have the entrapment issue presented to the jury as set forth in *Sorrells v. United States, Supra.*

This decision invites over-zealous agents of the government to send an informer to effect the inducement. It allows the over-zealous agents to take advantage of the previous acts and statements of the informer with impunity. Such an erosion of *Sherman v. United States, Supra,* should not be allowed.

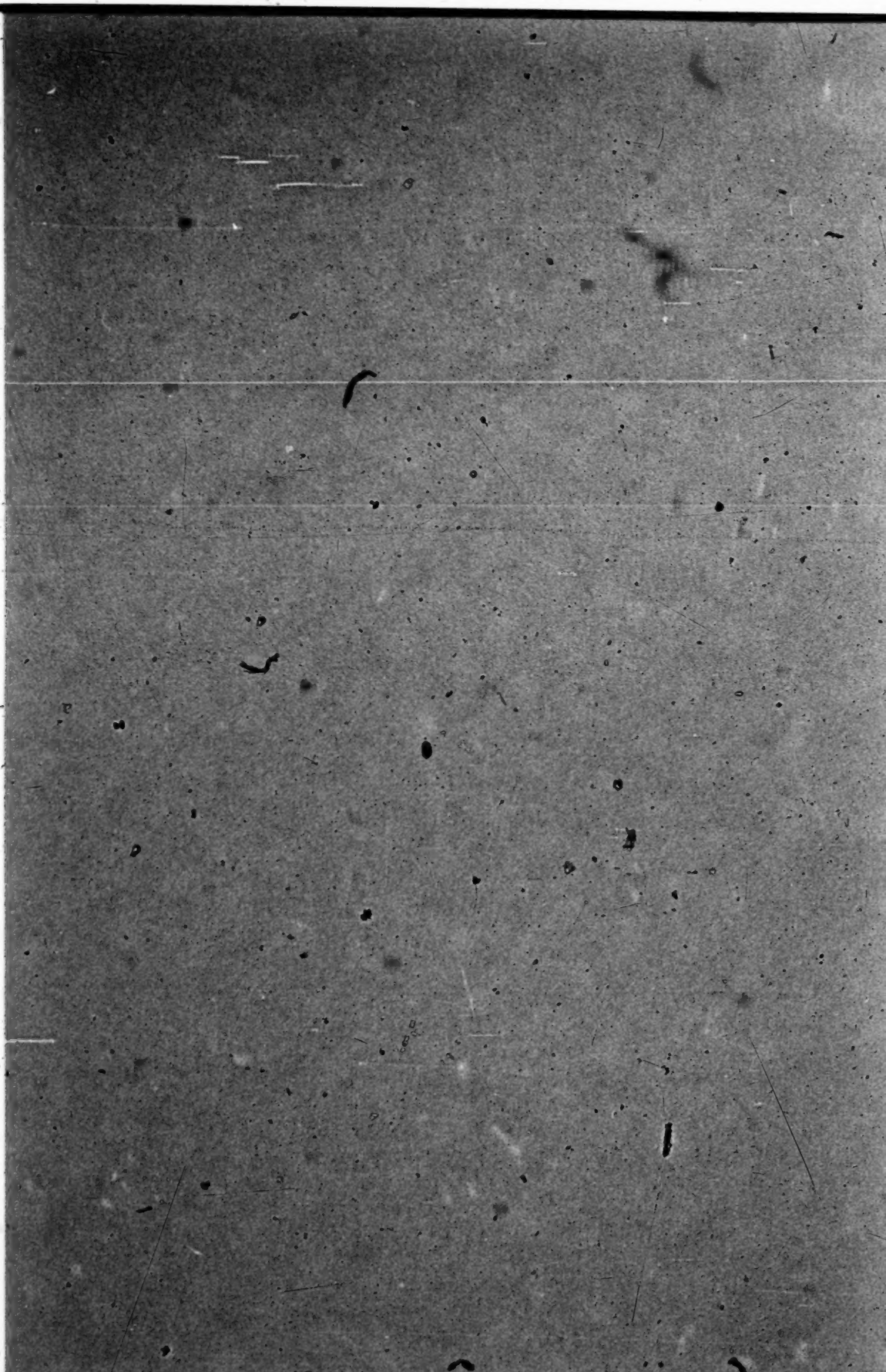
CONCLUSION

For the foregoing reasons a writ of certiorari to review the judgment of the court of appeals for the Fourth Circuit should issue.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15,361

UNITED STATES OF AMERICA,
Appellee,

versus

WILLIE JAMES THARPE,
Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.
Edwin M. Stanley, District Judge.

(Argued April 8, 1971 Decided May 28, 1971)

Before Haynsworth, Chief Judge, Bryan, and Butzner, Circuit Judges.

Irvin B. Tucker, Jr., and H. L. Riddle, Jr., for appellant; William L. Osteen, United States Attorney for the Middle District of North Carolina, for appellee.

PER CURIAM:

Willie James Tharpe appeals his conviction for transporting nontaxpaid distilled liquor in violation of 26 U.S.C. § 5601. At trial, Tharpe, who admitted the transaction, based his defense on entrapment. He contended he succumbed to the importunities of a government agent named Stokes and a government informer named Weatherman after he had initially set his will against breaking the law. The trial judge, however, excluded Tharpe's testimony about the informer's alleged statements as hearsay on the ground that there was no showing Weatherman was working for the government.

Exclusion of Tharpe's testimony describing Weatherman's statements was error. On cross-examination, Stokes, who admitted knowing Weatherman, testified he told Tharpe that he was Weatherman's friend and that Weatherman had sent him. He also admitted he did this on instructions from his superior officer. These facts are sufficient to establish that Weatherman was an instrument in the government's investigation of Tharpe, and statements Weatherman made which might have worn down Tharpe's will were relevant to the entrapment issue.

Nevertheless, the erroneous exclusion of Weatherman's alleged statements was not reversible error, for even with the excluded testimony, Tharpe failed as a matter of law to establish that he was entrapped. In *Sherman v. United States,* 356 U.S. 369, 372 (1958), the Supreme Court said that the entrapment occurs when official activity creates criminal conduct. And this court has specifically held that mere solicitation is insufficient to create the kind of inducement the entrapment defense was intended to correct. *United States v. DeVore,* 423 F. 2d 1069, 1072 (4th Cir. 1970), *cert. denied,* 39 U.S.L.W. 3480 (U.S. May 4, 1971). In this case, by his own testimony Tharpe acknowledges a *hiatus* of over a month between his last contact with Weatherman

in April when he had made a sale to Stokes at Weatherman's urging and the commission of the offense in May. He also *admits* that Stokes did not contact him for the same length of time. Moreover, he stated that he was in serious financial difficulty and that he agreed to deal in nontaxpaid distilled liquor because he needed the money. In these circumstances, Stokes' request for a delivery of illegal whiskey in May was no more than a solicitation which gave Tharpe the opportunity to commit a crime.

Tharpe also contends that his character witness was improperly cross-examined, but after an examination of the record, we find no reversible error. The judgment of the district court is affirmed.

AFFIRMED.